Was it "fair summation" to argue to the jury that petitioner was "handy with a gun" (R. 3692) particularly in the absence of any evidence that petitioner ever had a gun in his hand? (See Petition, pp. 14-15.)

IX

(Petition, pp. 31-32)

The Government's brief (p. 21) is not correct in stating that there was proof of an overt act in the Southern District of New York within three years prior to the filing of the indictment. The alleged overt act is the conversation between D'Andrea and Barger in the summer of 1942. While the Trial Court at first overruled petitioner's objections to this testimony (R. 2143-2148)—which rulings appear clearly to be erroneous—the Trial Court finally decided that the testimony regarding these conversations would be received only as against D'Andrea (R. 2151). It is to be noted that in the Trial Court's summary in its charge of the alleged overt acts occurring within the period of limitation (R. 3734), no reference is made to this alleged occurrence.

Incidentally, as illuminating the Government's technique here (p. 21) as in the Trial Court, in invoking the name of Capone to create prejudice, the record may be consulted to see whether D'Andrea took "Ralph Capone with him to enforce his demands" (R. 2150).

The Government's argument appears to overlook the essential difference between a conspiracy which is an offense as soon as made, and one which has a *locus poenitentiae* of an overt act.

The Government's brief (pp. 19-20) treats as a variance and ignores the falsity of the allegation that the defendants conspired in the Southern District of New York, which was of a piece with the falsity in the allegations concerning "unknown" persons.

This petitioner certainly was not shown to have had any part either in the formation of the alleged conspiracy or

in any of the overt acts within the Southern District of New York. (Bioff was the actor in the Southern District of New York. He said (R. 944) Kaufman was never his partner.)

The Government's brief (pp. 32-33) argues that it is established law that a defendant must prove an affirmative act of withdrawal before he may have the benefit of the statute of limitations.

This ignores the point sought to be made by petitioner that the charge here put the burden of proof, as distinguished from the burden of adducing evidence, upon the defendants. While it may be that a defendant has the burden of adducing evidence of withdrawal, it is respectfully submitted that the burden of proof in a criminal case can never shift from the Government. The error of the Trial Court's charge in this case was that it imposed upon the defendants the burden of proof.

So far as the burden of adducing evidence is concerned, the Government's own proof showed that at a time more than three years prior to the filing of this indictment, Kaufman had affirmatively stated that he was acting for himself alone. There was no proof that thereafter he had done anything at all even remotely connected with any conspiracy. Thus there was on his part affirmative disavowal of any part in any putative conspiracy. The least that was required under the rule of the *Hyde* case (225 U. S. 347) and the *Local 167* case (291 U. S. 293) was that the jury be advised that this proof could be considered. But the request for an adequate charge (#10, R. 3788) was denied. Instead of informing the jury, as requested, that the testimony might be considered upon the question whether Kaufman had disassociated himself from any conspiracy, the jury was told that his very conduct at the time of the disavowal could be considered as proof of guilt. If that is the correct rule, then the statute of limitations is a dead letter in any conspiracy case so far as any withdrawing defendant is concerned.

X

(Petition, pp. 32-33; see also question (j) p. 16)

The Government's brief (pp. 24-26) fails to consider the essential point that the testimony elicited of the "victims'" state of mind was purely subjective,—not evinced in any manner at the time in question.

If the use of such testimony is not condemned by this Court, a defendant will always be at the mercy of an afterthought, and the jury may be swayed by the hindsight of a witness.*

The Government's brief ignores completely the very serious question whether this statute can be construed to include the bare threat of a strike, without any threat of force or violence, as being within the meaning of "coercion".

Miscellaneous Matters

No. 6 of the questions presented (p. 19) in the petition concerned the matter of severance. The Government's brief in opposition is the latest demonstration of the unfairness to the petitioner, throughout this case, in putting him to trial with all of the other defendants and so burdening him with all of the extraneous proof not competent against him alone. Most of the questions presented would never have been in the case had Kaufman been granted the separate trial which simple justice demanded that he have. The Government's brief has ignored the matter of severance. Perhaps this was because there is no answer to it.

No mention is made in this reply brief of the several lapses in the Government's statement of the facts. They do not affect the primary questions presented. The most noteworthy fact about the Government's brief is its avoidance of any discussion of the very matters which justify consideration of petitioner's case by this Court. But petitioner's contentions are not upon the plane of mere trial errors.

*Such testimony does not admit of the possibility of negation. There is no way to test its truth.

Conclusion.

Petitioner contends that the record presents questions involving constitutional rights, the proper interpretation and application of an important Federal statute, and important questions of evidence and of substantive criminal law upon which there is a demonstrated conflict between the Second Circuit and other Circuits, and a disregard by the Second Circuit of applicable decisions of this Court. The failure of the Government's brief to meet these issues is perhaps persuasive that they merit the consideration of this Court. Petitioner's plea is for an opportunity for a full hearing by this Court, in order that he may have an unprejudiced appraisal of the record.

Respectfully submitted,

J. Bertram Wegman,
Harold Simandl,
Counsel for Petitioner.